

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER KENNEDY**
(Mailed April 20, 2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Rules to Ensure Reliable, Long-Term
Supplies of Natural Gas to California.

Rulemaking 04-01-025
(Filed January 22, 2004)

**OPINION REGARDING INTERVENOR COMPENSATION
FOR THE UTILITY REFORM NETWORK FOR SUBSTANTIAL
CONTRIBUTIONS
TO DECISION 04-09-022**

This decision awards The Utility Reform Network (TURN) \$31,002.49 in compensation for its contribution to Decision (D.) 04-09-022. This award reflects the amount that TURN requested, less the amount attributable to activities that occurred before this rulemaking was initiated.

1 Background

The Commission opened this rulemaking, R.04-01-025, to ensure that California does not face a natural gas shortage in the future. D.04-09-022 addressed the Phase I issues in this rulemaking, including interstate pipeline capacity contracts for natural gas, providing proposed suppliers of liquefied natural gas (LNG) with access to intrastate pipelines, and improving access to interstate pipelines. This rulemaking remains open to address Phase II issues.

2 Requirements for an Award of Compensation

The intervenor compensation program, enacted by the Legislature in Public Utilities Code §§ 1801-1812,¹ requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers.

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient Notice of Intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)
5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)

¹ All code section references are to the Public Utilities Code.

6. The fees and costs being requested must be incurred in “preparation for and participation in a hearing or proceeding.” (§§ 1803, 1802(a).)
7. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

We first address the combined procedural issues in Items 1-4 above, followed by separate discussions on Items 5-7.

3 Procedural Issues

Since no prehearing conference was held, the June 18, 2004 “Scoping Memo and Ruling of the Assigned Commissioners for Phase I” directed that any party seeking intervenor compensation file an NOI with the Docket Office by July 16, 2004. TURN filed a timely NOI on July 15, 2004. On August 24, 2004, Administrative Law Judge (ALJ) Wong issued a ruling that found TURN to be a customer pursuant to §1802(b), that it met the financial hardship requirement pursuant to §1804(a)(2)(B), and that it was eligible to file for an award of intervenor compensation.

TURN filed its request for compensation on November 9, 2004, within the required 60 days from the issuance of D.04-09-022. Southern California Gas Company (SoCalGas) and Pacific Gas and Electric Company (PG&E) filed responses to TURN’s request for compensation on November 24, 2004, and December 6, 2004, respectively.

TURN has satisfied all the procedural requirements necessary to make its request for compensation.

4 Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding we look at several things. First, did the ALJ or Commission adopt

one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See §1802(i).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§1802(i) and 1802.5.) As described in §1802(i), the assessment of whether the customer made a substantial contribution requires the exercise of judgment. We have stated:

“In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.” (D.98-04-059 [79 CPUC2d 628, 653].)

With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding. We find that TURN provided analyses and recommendations regarding three primary issues, and that its positions were largely adopted in D.04-09-022.

The first issue was the core interstate capacity acquisition process that SoCalGas proposed. TURN supported SoCalGas' proposal that the Commission adopt an interstate pipeline capacity acquisition process.² TURN also recommended that the Commission establish a more formal consultative process. The Commission generally agreed with SoCalGas' proposal and adopted an

² TURN's request for compensation includes 15.5 hours of “pre-filing” time spent discussing the interstate capacity acquisition proposal with SoCalGas before the initiation of this rulemaking. The request to be compensated for this time is discussed later in this section of the decision.

expedited advice letter and consultation process. As part of the consultation process and expedited approval process, D.04-09-022 included both TURN and the Office of Ratepayer Advocates (ORA) as part of this process. (D.04-09-022, pp. 27, 84, Finding of Fact (FOF) 15.)

PG&E proposed a similar process for obtaining Commission approval for capacity contracts, but PG&E's proposal included LNG and intrastate capacity contracts as part of the proposed pre-approval process. TURN opposed PG&E's proposal to pre-approve the LNG contracts. The Commission rejected PG&E's proposal and adopted the same conditions for PG&E as it did for SoCalGas and San Diego Gas & Electric Company (SDG&E). The Commission stated that the LNG contracts should be addressed in advice letter filings, with the understanding that the utilities might have to file a formal application for the approval of LNG contracts. (D.04-09-022, pp. 39-40, 86, FOF 33, FOF 34.)

The second issue is support of SoCalGas' proposal for a transportation capacity commitment range of 80 to 110% during non-winter months and 90 to 120% during the winter months. TURN took the position that SoCalGas' proposal provided financial benefits to ratepayers, and discussed the difference between price protection versus reliability of service. Instead of adopting SoCalGas' proposed range, D.04-09-022 adopted a planning range of 100 to 120% for SoCalGas. Although D.04-09-022 acknowledged TURN's support of SoCalGas' proposed planning criteria, the Commission decided to "be more conservative than SoCalGas in setting the capacity planning range, " and found that the "cost of interstate capacity is relatively small as compared to the cost of gas in the spot market. (D.04-09-022, pp. 30, 85, FOF 18, FOF 19.)

PG&E proposed a 1-in-10 year peak day and a 1-in-10 year cold winter criteria for core planning. TURN opposed PG&E's proposal based on insufficient evidentiary support. D.04-09-022 did not adopt PG&E's

proposed planning standards. The Commission stated that there was “an insufficient record to resolve PG&E’s intrastate system reliability proposal in this proceeding.” (D.04-09-022, pp. 34, 85, FOF 25, FOF 26.)

The third issue that TURN focused on involves the proposals of SoCalGas, SDG&E, and PG&E for the Commission to authorize a policy of rolled-in ratemaking for LNG-related infrastructure improvements if a positive benefit/cost ratio for the project could be shown. TURN opposed these proposals because of the cost impact on ratepayers. In D.04-09-022, the Commission agreed that the rolled-in proposals would authorize a process by which rates would be increased, and that it was appropriate to wait before deciding whether the Commission should adopt a policy of rolled-in ratemaking. (D.04-09-022, pp. 65, 87, FOF 42, FOF 44.)

Another area where TURN asserts it made a substantial contribution was the proposal of SoCalGas and SDG&E to integrate their two systems. TURN favored addressing the system integration issue in a later phase of the proceeding. In D.04-09-022, the Commission deferred consideration of the system integration proposal and ordered SoCalGas and SDG&E to file a separate application to address this issue. (D.04-09-022, pp. 67, 87-88, 91, FOF 47, FOF 48, Conclusion of Law (COL) 15.)

As described in the above paragraphs, and reflected in D.04-09-022, TURN achieved a high level of success on the issues it raised. In the areas where we did not adopt TURN’s position in whole or in part, we benefited from TURN’s analysis and discussion of the issues that it raised. The Commission has awarded full compensation even when the intervenor’s positions were not adopted in full, especially in proceedings with a broad scope and where the intervenor’s positions were comprehensive. (See

D.98-04-028, [79 CPUC2d 570, 573-574].) We find that TURN's efforts made a substantial contribution to D.04-09-022.

In addition to compensation for its work performed within this proceeding, TURN also seeks compensation for work it performed before this rulemaking was initiated. TURN's pre-rulemaking work involved discussions about the interstate capacity acquisition process that SoCalGas proposed in this proceeding. TURN also seeks compensation, or an order determining the appropriate proceeding in which to seek compensation, for the ongoing consultation process regarding potential capacity contracts that was adopted in D.04-09-022. SoCalGas supports TURN's request for compensation.

Work that TURN performed before the rulemaking was initiated is not compensable under the intervenor compensation statutes. Section 1803 states in pertinent part that "The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding...." (emphasis added). Similarly, §1802(a) provides in pertinent part that " 'Compensation' means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding...." (emphasis added). The plain meaning of the statutory language requires work to be performed within the context of a proceeding or hearing in order for that work to be compensated under the intervenor compensation statutes. It is not possible for work to be related to or in "preparation" for a particular proceeding when that proceeding has not yet been initiated and therefore does not yet exist.

Although we are not required to look beyond the plain meaning of the intervenor compensation statutes in denying intervenor compensation for work performed before a proceeding was opened, we take note of the fact that if we

were to decide otherwise, we would invite entities to seek intervenor compensation for work related to any issue within the jurisdiction of the Commission, and at any time, under the guise of being related to or in “preparation” for an eventual proceeding.

TURN contends that the Commission has awarded “compensation for work done in anticipation of an application,” and “for time spent in negotiations in one proceeding that resulted in a settlement agreement that was subsequently filed in a different proceeding.” (TURN’s Request for Compensation, pp. 18-19.) The circumstances cited by TURN are distinguishable from the instant matter. We are not, for example, resolving an issue that was partially litigated in an earlier proceeding and then deferred to another proceeding. Since the 15.5 hours of work occurred before this rulemaking was even opened, these hours are not compensable. To the extent our previous decisions have resulted in a lack of clarity on this issue, we take this opportunity to affirm the plain meaning of the intervenor compensation statutes, which require work to be performed within a proceeding or hearing in order for that work to be compensable.

With respect to the post-decision consultation process, TURN claims 27 hours for work related to meeting with SoCalGas, and to a limited extent with PG&E, to review arrangements for interstate capacity. In the future, TURN anticipates it will seek compensation for its capacity contract consultation activities in each utility’s gas cost incentive mechanism (GCIM), which includes the costs for interstate pipeline capacity.³ TURN states that because it may be too late to request the costs

³ On a going forward basis, SoCalGas supports TURN’s intent to seek compensation in the GCIM proceeding for its time related to consultation activities. PG&E also supports the principle that “TURN should be fairly and reasonably compensated for time that it spends on consultation and decision-making in the expedited pre-approval process for

that TURN incurred in SoCalGas' current GCIM, A.04-06-025, TURN seeks compensation as part of this request. In the alternative, TURN requests the Commission to specify the proceeding in which TURN should file this claim. Since TURN included its consultation hours in its request for compensation, we will address those costs in this decision. TURN may seek the remainder of any 2004 contract consultation activities in A.04-06-025 or in SoCalGas' next GCIM proceeding.

5 Reasonableness of Requested Compensation

Having determined that TURN made a substantial contribution to D.04-09-022, our next task is to determine whether the compensation requested is reasonable.

TURN requests a total of \$35,201.24 for its participation in this proceeding. This amount is made up of \$35,042.75 for 166.7 hours of its attorneys' time, and \$158.49 for direct expenses.⁴ TURN submitted logs showing the time and work performed by TURN's attorneys and the direct expenses that TURN incurred. TURN allocated the costs and fees by issues and tasks as described at pages 13 to 15 and Attachment A of its request for compensation.

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

gas pipeline capacity contracts that was adopted in Decision 04-09-022." (PG&E, Response, p. 1.)

⁴ Removal of the 15.5 hours for TURN's time before this proceeding was opened results in a claim of 107.2 hours of attorneys' time or \$30,844. The reduced attorneys' time and the direct expenses add up to a total of \$31,002.49.

To assist us in determining the reasonableness of the requested compensation, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of a customer's participation should bear a reasonable relationship to the benefits realized through their participation. This showing assists us in determining the overall reasonableness of the request.

TURN notes that it is difficult to assign quantifiable benefits to its participation in policy proceedings that affect future ratemaking policies. However, TURN asserts that its opposition to the rolled-in proposals prevented up to \$200 million in capital investments from being added into rates. We also stated in D.04-09-022 at page 27 that the consultation process with TURN and ORA would provide some assurance that the utilities' interstate capacity commitments would be reasonable due to their knowledge about needed capacity and their strong advocacy viewpoints.

We find that TURN's participation was productive, and bears a reasonable relationship to the benefits ratepayers realized as compared to the amount of compensation that TURN is seeking in this proceeding.

Next, we must assess whether the hours that the customer claims, resulting in a substantial contribution to the Commission decision, were reasonable. TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorneys, accompanied by a brief description of each activity. The hourly breakdown reasonably supports the claim for total hours.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. TURN seeks an hourly rate for Florio in 2004 of \$470, and an hourly rate for Hawiger in 2004 of \$270. The hourly rate adopted in 2003 for Florio and Hawiger was \$435

and \$250, respectively. TURN's hourly rates requested for work performed in 2004 reflect an 8% increase, consistent with Resolution ALJ-184. TURN has requested in other Commission proceedings the same rates for work performed by Florio and Hawiger in 2004.

Since the 2003 hourly rates for Florio and Hawiger were previously approved by the Commission, we will allow the 2003 hourly rates to be escalated by 8% for 2004 as discussed in Resolution ALJ-184. Thus, the adopted hourly rate for Florio for work performed in 2004 shall be \$470, and the adopted hourly rate for Hawiger for work performed in 2004 shall be \$270. We find those hourly rates to be reasonable.

The itemized direct expenses submitted by TURN are for photocopying and telephone/fax expenses which total to \$158.49. The cost breakdown in Attachment B of the request for compensation shows these expenses to be commensurate with the work performed, and we find these costs to be reasonable.

6 Award

We award TURN the amount of \$31,002.49.

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing the 75th day after TURN filed its compensation request and continuing until full payment of the award is made.

PG&E's response to TURN's request for compensation raises the issue of which utility should pay TURN. PG&E states that in rulemaking proceedings, the tradition has been to allocate intervenor compensation among the utilities based on the relative California gas revenues of the utilities. PG&E contends that

to do so with TURN's compensation request would be unfair because 40% of TURN's time was spent on the rolled-in ratemaking proposal of the Sempra utilities. According to PG&E, the rolled-in proposal never involved PG&E, and would have no effect on PG&E. PG&E does not believe that it should have to pay for this effort.

A second category of work that TURN performed, and which PG&E believes should be allocated to the Sempra utilities, is the 20% of TURN's time spent on post-decision consultations. According to PG&E and TURN, most of the consultation was with SoCalGas.⁵ PG&E believes that each utility, including PG&E, should pay for the cost of its own consultation with TURN.

The third category of work involved 35% of TURN's time that was spent on the interstate capacity acquisition procedures, including the pre-rulemaking negotiations. PG&E contends it did not know about, and did not participate in, the pre-rulemaking negotiations, and questions whether it should have to pay for the pre-rulemaking negotiations.

PG&E contends that at most, PG&E should only be allocated a pro rata share of TURN's costs of between 1.85% and 14.85%. This range varies depending on the category of TURN's work that the Commission believes PG&E should share in the allocation of the costs.

We have considered PG&E's allocation of cost argument, and the category of work to which TURN allocated its time. We believe that PG&E should be responsible for paying 22% of the \$31,002.49. The 22% represents TURN's work on the "interstate capacity acquisition procedures," excluding the 15.5 hours associated with TURN's work before the proceeding was opened and TURN's

⁵ According to Attachment A of TURN's request for compensation, TURN's post-decision consultation with PG&E amounted to 0.75 hours.

work on the “other issues,” as shown in Table 4 of TURN’s request for compensation.⁶ Since TURN’s participation on the interstate capacity acquisition procedures and on the other issues apply to PG&E, as well as to SoCalGas and SDG&E, PG&E should pay its share of those costs. The remaining work that TURN seeks compensation for is almost entirely related to the Sempra utilities.⁷

PG&E shall be responsible for paying 22% of TURN’s award, or \$6820.55. SoCalGas shall pay TURN the amount of \$21,038.29, and SDG&E shall pay TURN the amount of \$3143.65.⁸

We remind TURN that Commission staff may audit its records related to this award and that TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN’s

⁶ The 22%, which has been rounded, is derived using PG&E’s percentage of 2002 gas revenues of 37.1331%, multiplied by 60%. The 60% represents the percentage of time that TURN worked on the “interstate capacity acquisition procedures” and on “other issues” after removal of 15.5 hours of the pre-rulemaking negotiations. The 60% is derived using “Table 4: Time Allocation” and Attachment C of TURN’s request for compensation. After removing the 15.5 hours of pre-rulemaking negotiations for the reason stated earlier, we add the 75.20 and 5.00 hours together, and multiply the resulting sum of 80.20 by 40% (“rolled-in ratemaking proposal”) and 5% (“other issues”), respectively. The remaining 44.11 of the 80.20 hours reflects that TURN spent 55% of its time on “interstate capacity acquisition procedures.” Adding the 55% and 5% together results in the 60%.

⁷ As noted earlier, 0.75 hours of the 27 hours of post-decision consultations involved PG&E. However, due to the derivation of TURN’s percentage of time allocation, which was based on “a subjective review of the time sheets and pleadings,” we have not allocated any of time associated with the “post-decision consultations” to PG&E.

⁸ The allocation to SoCalGas and SDG&E is based on the 2002 gas revenues percentages of SoCalGas (54.74149%) and SDG&E (8.12541%), divided by the sum of the two percentages (62.8669%). That is, of the remaining \$24,181.94 in costs, SoCalGas is allocated 87% and SDG&E is allocated 13%. Even though the majority of TURN’s work was performed in 2004, we use the 2002 gas revenues for the allocation of costs. The use of updated 2004 gas revenues for SoCalGas and SDG&E is likely to have only a minor impact on the allocation of the award amount.

records should identify specific issues for which it requested compensation, the actual time spent by each employee, the applicable hourly rate, and any other costs for which compensation was claimed.

7 Comment Period

The alternate draft decision of Commissioner Kennedy was mailed to the parties in accordance with §311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments to the alternate draft decision may be filed in accordance with Rule 77.7.

8 Assignment of Proceeding

Michael R. Peevey and Susan P. Kennedy are the Assigned Commissioners. Steven A. Weissman⁹ and John S. Wong are the assigned ALJs in this proceeding.

Findings of Fact

1. The August 24, 2004 ruling determined that TURN was eligible to file for an award of compensation in this proceeding.
2. TURN made a substantial contribution to D.04-09-022 as described in the text of this decision.
3. TURN's hourly rates for its attorneys for work performed in 2004 are reasonable.
4. The 15.5 hours of pre-filing work that TURN requests were incurred before this rulemaking was initiated.
5. The total of the reasonable compensation is \$31,002.49.

⁹ At the time TURN's request for intervenor compensation was filed, David K. Fukutome was the co-assigned ALJ.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation incurred in making substantial contributions to D.04-09-022.
2. The intervenor compensation statutes require that work be performed and costs incurred within an ongoing proceeding or hearing in order to be compensable.
3. TURN should be awarded \$31,002.49 for its contribution to D.04-09-022.
4. The costs of the award should be borne by PG&E, SoCalGas, and SDG&E in the amounts described in this decision.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$31,002.49 as compensation for its substantial contributions to Decision 04-09-022.
2. Within 30 days of the effective date of this decision, Pacific Gas and Electric Company, Southern California Gas Company, and San Diego Gas & Electric Company shall pay TURN the respective amounts of \$6820.55, \$21,038.29 and \$3143.65.

3. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning January 23, 2005, the 75th day after the filing date of TURN's request for compensation, and continuing until full payment is made.

This order is effective today.

Dated _____, 2005, at San Francisco, California.

A P P E N D I X**Compensation Decision Summary Information**

Compensation Decision:		Modifies Decision? No
Contribution Decision(s):	D0409022	
Proceeding(s):	R0401025	
Author:	Commissioner Kennedy	
Payer(s):	PG&E, SoCalGas, and SDG&E	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
The Utility Reform Network	11/9/04	\$35,201.24	\$31,002.49	No	Work performed prior to the initiation of the rulemaking.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Marcel	Hawiger	Attorney	The Utility Reform Network	\$270	2004	\$270
Michel	Florio	Attorney	The Utility Reform Network	\$470	2004	\$470

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties of which an electronic mail address has been provided; this day served a true copy of the original attached Alternate Draft Decision of Commissioner Susan Kennedy on all parties of record for proceeding R.04-01-025 or their attorneys of record.

Dated April 20, 2005 at San Francisco, California.

Christopher V. Mei

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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